(21)

No. 95-1184

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE, PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 58 F.3d 1367. The opinion of the district court (Pet. App. 40a-100a) is unreported. The opinions of the Judicial Officer of the Department of Agriculture (Pet. App. 114a-268a) are reported at 49 Agric. Dec. 705 and 50 Agric. Dec. 1165.[1]

[1] The Judicial Officer (JO) issued two decisions, one dismissing each of the administrative petitions that respondents, and others, filed in the administrative proceedings that led to the present case. Because of the length of the JO's decisions, and the fact that they are reported, we reproduced in the appendix to the petition (Pet. App. 113a-274a) only the JO's decision that addresses the question presented here,

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1995. A petition for rehearing was denied on September 18, 1995. Pet. App. 2a. On December 15, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including January 16, 1996. On January 11, 1996, Justice O'Connor further extended the time within which to file a petition to and including January 24, 1996. The petition for a writ of certiorari was filed on that latter date, and was granted on June 3, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 are 7 U.S.C. 608a(6), 608c(1)-(4), (6), (7) and (15), and 610(b)(2) and (c). They are reproduced at Pet. App. 275a-286a.

The relevant regulations implementing the Act are 7 C.F.R. 916.20, 916.31, 916.40, 916.41, 916.45, 916.62; and 7 C.F.R. 917.4, 917.16, 917.20, 917.30, 917.34-917.37, and 917.39. They are reproduced at Pet. App. 287a-296a.

STATEMENT

This case presents a First Amendment challenge to provisions in the marketing orders for California peaches, nectarines, and plums issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.*

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and omitted from that decision the concluding portions that have no bearing on the First Amendment question.

The challenged provisions impose mandatory assessments on the handlers (*i.e.*, packers and distributors) of California peaches, nectarines, and plums. The assessments are used to finance the administration of the orders, including the generic advertising of the covered commodities. See 7 C.F.R. 916.45 and 917.39.

1. Congress passed the AMAA in 1937 in order to address the serious problem of instability in the agriculture industry and the resulting threat to the national economy. In enacting the AMAA, Congress determined that:

> [T]he disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure[,] and * * * these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

7 U.S.C. 601. The Act seeks, through a variety of means, to "establish and maintain * * * orderly marketing conditions for agricultural commodities in interstate commerce," 7 U.S.C. 602(1), and, "in the interests of producers and consumers," to provide an orderly flow of supply of the commodities so as "to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. 602(4); see *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 543-546 (1939). As relevant here, the Act authorizes the Secretary to develop and implement "minimum standards of quality and maturity" and "production research, marketing research, and development projects." 7 U.S.C. 602(3).

The AMAA authorizes the Secretary to carry out his statutory duties by issuing marketing orders for certain commodities, including peaches, nectarines, and plums. 7

U.S.C. 608c(1) and (2). A marketing order may include limits on the quantity, quality, grade, and size of the commodity that may be marketed. 7 U.S.C. 608c(6)(A). It may also provide for "production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of the commodity. 7 U.S.C. 608c(6)(I). The Act specifies that such projects may include—with respect to certain commodities, including California-grown peaches, nectarines, and plums—"paid advertising." *Ibid.*[2] The Act further provides that "the expense of such projects [is] to be paid from funds collected pursuant to the marketing order." *Ibid.*; see also 7 U.S.C. 610(b)(2)(ii) (handlers shall pay annual asessments equal to their pro rata share of expenses of administering marketing orders).

Before issuing a marketing order for a commodity, the Secretary conducts a formal rulemaking proceeding and must in general obtain approval of the order either by two-thirds of the producers (growers) of the commodity, or by the producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. 608c(3)-(4), (8) and

[2] The provision authorizing the Secretary to establish "marketing * * * development projects" was added to the AMAA in 1954. Agricultural Act of 1954, Pub. L. No. 83-690, § 401(c), 68 Stat. 906. The provision specifying that those projects may include "paid advertising" with respect to certain commodities was first added to the AMAA by the Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 403, 76 Stat. 632 (authorizing paid advertising of cherries), and was extended to the commodities at issue here in amendments to the AMAA made between 1965 and 1971. See Act of Nov. 8, 1965, Pub. L. No. 89-330, § 1(b), 79 Stat. 1270 (extending "paid advertising" provision to, *inter alia*, California plums and nectarines); Act of Aug. 13, 1971, Pub. L. No. 92-120, § 1, 85 Stat. 340 (extending "paid advertising" provision to California peaches).

(9)(B); see *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 342 (1984); *United States* v. *Rock Royal Co-operative*, 307 U.S. at 547-548. Once in place, a marketing order is administered under the Secretary's supervision by a committee that typically is composed of producers, or producers and handlers, of the regulated commodity. 7 U.S.C. 608c(7)(C), 610; 7 C.F.R. 916.20, 917.16-917.25. The members of such a committee are appointed by the Secretary, serve without compensation, and are subject to removal by the Secretary at any time. 7 C.F.R. 916.23, 916.33, 916.62, 917.25, 917.30. Among other duties, the committee recommends a yearly budget for administering the marketing order, which includes a budget for advertising and other types of promotion. See J.A. 464 (PX 297x). The Secretary may accept or reject the committee's recommendation. 7 U.S.C. 608c(7)(C); 7 C.F.R. 916.31(c), 916.62, 917.35(f); see Pet. App. 10a-11a (describing budget-approval process in this case). After the Secretary adopts a budget, he promulgates a rule imposing assessments on handlers to fund the budget. See 7 U.S.C. 610(c); 7 C.F.R. 916.41, 917.37; see also, *e.g.*, 60 Fed. Reg. 52,067, 52,068 (1995) (approving expenditures and establishing assessments for California nectarines and peaches for 1995-1996 fiscal year).

A marketing order may be discontinued in two ways. The Secretary must terminate or suspend an order if he finds that it "obstructs or does not tend to effectuate the declared policy" of the AMAA, 7 U.S.C. 608c(16)(A)(i), and he must terminate an order if he determines that a majority of producers does not support it. 7 U.S.C. 608c(16)(B). In addition, a handler who is subject to a marketing order may petition for modification of, or exemption from, the order on the ground that "such order or any provision of * * * such order or any obligation

imposed in connection therewith is not in accordance with law." 7 U.S.C. 608c(15)(A).[3]

2. This case concerns two marketing orders issued under the AMAA: the marketing order for California-grown peaches and plums and the marketing order for California-grown nectarines.[4] The marketing order for

[3] On April 4, 1996, the President signed into law the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888. The FAIR Act addresses generic promotion for agricultural commodities both by setting forth congressional findings regarding the impact of such promotion, and by creating new authority for the Secretary in this area. See FAIR Act, §§ 501-579, 110 Stat. 1029-1083. Subsection (a) of Section 501 defines "commodity promotion law[s]" to include "the marketing promotion provisions under section 8c(6)(I)" of the AMAA, 7 U.S.C. 608c(6)(I), which is the Act at issue here. FAIR Act, § 501(a)(1), 110 Stat. 1029. Subsection (b) sets forth congressional findings concerning, *inter alia*, the need for and effectiveness of "generic commodity promotion programs established under commodity promotion laws." See, *e.g.*, FAIR Act, § 501(b)(1), 110 Stat. 1030. Subsection (c) generally requires every commodity board established under a commodity promotion law to fund periodic, independent evaluations of the generic promotion program that it administers, to submit the results of those evaluations to the Secretary, and to make the results publicly available. FAIR Act, § 501(c), 110 Stat. 1031, Pet. App. 4a-5a. Subsection (d) relates to the administrative expenses of such programs. FAIR Act, § 501(d), 110 Stat. 1031.

The FAIR Act also grants the Secretary new authority to issue orders, on petition or on his own initiative, establishing boards to develop and carry out nationwide generic promotional programs funded by mandatory assessments on handlers (and importers, with respect to imported commodities). See FAIR Act, §§ 511-526, 110 Stat. 1032-1048. Continuation of such orders is subject to approval by overed persons as determined in periodic referenda. See FAIR Act, § 518(b), 110 Stat. 1043-1044.

[4] The AMAA requires marketing orders to be restricted "to the smallest regional production areas * * * practicable" and consistent with the Act. 7 U.S.C. 608c(11)(B). For that reason, there

California peaches and plums was first issued in 1939. See 4 Fed. Reg. 2135 (1939); Pet. App. 43a. It was amended in 1965 to authorize marketing promotion projects. 30 Fed. Reg. 15,995 (1965). It was further amended in 1971 to specify that such projects could include "paid advertising" for plums, and began in 1976 to authorize advertising for peaches. See 36 Fed. Reg. 14,381 (1971); 41 Fed. Reg. 14,375, 17,528 (1976). The plum portion of the marketing order ended in 1991, after a majority of plum producers failed to vote for its continuation in a periodic referendum. Pet. App. 5a n.1, 43a; 56 Fed. Reg. 14,633 (1991); *id.* at 23,772.[5]

The marketing order for California nectarines went into effect in 1958. See 7 C.F.R. 937.45 (1959). It has authorized marketing promotion projects since its inception, and has specifically authorized "paid advertising" since 1966. See 31 Fed. Reg. 8177 (1966). A portion of the assessments imposed on handlers by the two marketing orders has been used to pay for generic advertising programs in each of the years at issue here. See Pet. App. 8a n.3.[6]

3. a. The present case arose from two administrative petitions filed pursuant to 7 U.S.C. 608c(15)(A) by re-

may be different orders for the same commodity grown in different States. Compare, *e.g.*, 7 C.F.R. Pt. 946 (marketing order for Irish potatoes grown in Washington State) with 7 C.F.R. Pt. 950 (marketing order for Irish potatoes grown in Maine) and 7 C.F.R. Pt. 953 (marketing order for Irish potatoes grown in southeastern States).

[5] Respondents seek a refund of that portion of past assessments that was used for the generic advertising program for plums. The validity of that program is therefore not moot.

[6] "[T]he committees have developed the details of the generic advertising program—radio and TV commercials ('California nectarines are the juiciest'), newspaper inserts ('How to make a peach pie with California peaches'), etc." Pet. App. 8a.

spondents, which are handlers of California peaches, nectarines, and plums. The petitions challenged various provisions of the marketing orders for California peaches, nectarines, and plums in effect from 1980 through 1988. Pet. App. 6a, 41a. The challenges were far-ranging but primarily concerned: (1) the substance of the maturity and size standards for nectarines, peaches and plums[7]; (2) the procedures followed by the Secretary in adopting those standards, and other provisions in the marketing orders; and (3) the generic advertising programs established by the orders.[8] *Ibid.* As additional handlers joined those challenges, they temporarily ceased paying their assessments. *Ibid.*

The Judicial Officer (JO) of the Department of Agriculture dismissed both administrative petitions (Pet.

[7] Before the Secretary had disposed of the administrative petitions, respondent Wileman Bros. & Elliott, Inc., brought an action in federal district court challenging the maturity standards in the marketing orders. The district court dismissed that action on the ground that Wileman Bros. had failed to exhaust administrative remedies. The court of appeals affirmed. *Wileman Bros. & Elliott, Inc.* v. *Yeutter*, No. 87-2938, 1990 WL 163929 (9th Cir. Oct. 29, 1990); see also Pet. App. 6a-7a.

[8] The generic advertisements and promotional materials produced by the committees under the two marketing orders include paid radio and television announcements, J.A. 396-400 (DX 303), 428-433 (DX 302), 530 (DX 301(b)), press materials, *e.g.*, Wileman II, DX 380, 381, "point-of-sale" materials for distribution at supermarkets and other retail establishments, *e.g.*, Wileman II, DX 383, and children's educational materials, *ibid.* Each of the materials bears the logo of, or is otherwise attributed to, "California Summer Fruits," the "California Tree Fruit Agreement," or both. See, *e.g.*, J.A. 530 (DX 301(b)). "Wileman II" refers to the second of the two administrative proceedings in this case, Docket Nos. F & V 916-3 and F & V 917-4; "Wileman I" refers to the first of the administrative proceedings, Docket No. CV-F-90-473(OWW).

App. 114a-274a), reversing two decisions by an administrative law judge (ALJ) in favor of respondents Wileman Bros. and Kash. See *id.* at 6a. Because the ALJ granted Wileman Bros. relief on non-constitutional grounds, she did not reach the First Amendment question here at issue. See Pet. App. 85a n.36. In the ruling relevant here,[9] the JO rejected respondents' First Amendment challenge to the Secretary's approval of budgets that included expenditures for generic advertising programs. He determined, *inter alia*, that, assuming that the use of mandatory assessments for generic advertising implicates handlers' First Amendment rights, such use is nonetheless permissible under "cases involving 'union-shop' arrangements," as well as under *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).[10] Pet. App. 194a-207a. The JO's decision represented the final decision of the Secretary. See 7 C.F.R. 2.35.

b. Respondents filed this action in the United States District Court for the Eastern District of California pursuant to 7 U.S.C. 608c(15)(B), which confers on the district courts jurisdiction in equity to review the Secretary's disposition of administrative petitions filed under Section 608c(15)(A). Contemporaneously, the United States brought 15 enforcement actions against the handlers under 7 U.S.C. 608a(6) to recover unpaid assessments and to require compliance with the maturity stan-

[9] As noted above (note 1, *supra*), the JO issued separate decisions on the two petitions. Only the later-filed petition challenged the generic advertising programs on First Amendment grounds.

[10] In *Frame*, the court upheld against First Amendment attack a generic beef promotion program created under the Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.*, and funded by mandatory industry assessments.

dards in the challenged marketing orders. Pet. App. 7a; see generally *United States* v. *Ruzicka*, 329 U.S. 287, 289 (1946). The district court consolidated 13 of the enforcement actions with respondents' action, dismissed two of the enforcement actions without prejudice, and ordered the handlers to pay assessments into the registry of the court. In a subsequent decision, the district court entered summary judgment in favor of the Secretary and entered a money judgment against the handlers for approximately $3.1 million. Pet. App. 108a, 7a.

The district court rejected respondents' First Amendment claims, applying the three-part inquiry articulated by the Third Circuit in *United States* v. *Frame*, *supra*. In accordance with that inquiry, the district court first determined that the mandatory funding of generic advertising serves the "compelling government interest" of avoiding instability in the Nation's agriculture markets. Pet. App. 89a. The court next determined that the generic advertising programs for California peaches, nectarines, and plums serve the "ideologically neutral" purpose of "bolster[ing] the image of California tree fruit in an effort to increase sales." *Id.* at 89a-90a. Finally, the court found that "[t]he assessment programs' interference with first amendment rights is slight." *Id.* at 90a. It explained that the programs promote products that respondents have voluntarily chosen to market, and that respondents' complaints about those programs reflected only disagreement over advertising strategies. *Id.* at 90a-91a.

The district court also rejected respondents' non-constitutional challenges, including their claim that the generic advertising programs were arbitrary and capricious, and should therefore be set aside under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*[11] Pet. App. 59a-81a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-37a. It affirmed the district court's rejection of respondents' APA challenge to the paid advertising provisions, observing that "[t]he formal rulemaking records accompanying the Secretary's original decisions to implement the paid advertising programs for nectarines, plums, and peaches are replete with evidence that supports his decision." *Id.* at 9a. The court also

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[11] In other rulings outside the scope of the petition for a writ of certiorari granted by this Court, the district court identified those claims by respondents over which it had jurisdiction, determined the type of relief that was available for those claims, and held, with respect to those claims, as follows: (1) the minimum-size requirements for nectarines were supported by substantial evidence (Pet. App. 58a-62a); (2) the Secretary had good cause for allowing those requirements to take effect in less than 30 days (*id.* at 63a-67a), and committed, at most, harmless error by adopting them after a comment period of less than 30 days (*id.* at 67a-71a); (3) the assessments imposed under the marketing orders, including the assessments for generic advertising, were not procedurally invalid under the APA (*id.* at 71a-84a); (4) the Secretary did not violate the equal protection guarantee of the Fifth Amendment by requiring the handlers of peaches and nectarines produced in California, but not the handlers of peaches and nectarines produced in other States, to pay assessments for generic advertising (*id.* at 92a-93a); (5) the AMAA did not unconstitutionally delegate legislative authority to the Secretary (*id.* at 94a); (6) the proceedings of the tree fruit committees did not violate the Government in the Sunshine Act, 5 U.S.C. 552b, the Federal Advisory Committee Act, 5 U.S.C. App. 1 *et seq.*, or state law (Pet. App. 95a-96a); (7) the handlers failed to demonstrate any illegal conduct by the "California Tree Fruit Agreement" (the term used to identify the committees and staff that administer the two marketing orders at issue) cognizable in the present case (*id.* at 96a-98a); and (8) the handlers were not deprived of procedural due process because of any delay by the Secretary in ruling on their administrative petitions. *Id.* at 98a-100a.

held that there was ample evidence to support the continued need for the programs. It observed that much of that evidence was supplied by the "industry-led committees and their staff," who "engage in a careful process each year * * * in approving the advertising program for the upcoming season." *Id.* at 11a. The court rejected respondents' argument that the Secretary relied too heavily on the Committees, observing that the Committees are made up of "parties with firsthand knowledge of the state of their industry." *Id.* at 12a (citing *Riverbend Farms, Inc.* v. *Madigan*, 958 F.2d 1479, 1488 (9th Cir.), cert. denied, 506 U.S. 999 (1992)).

The court of appeals nevertheless reversed the district court's holding that the challenged generic advertising programs satisfy the requirements of the First Amendment. Pet. App. 15a-21a. The court observed that its First Amendment analysis was "largely governed by" (*id.* at 15a) its prior decision in *Cal-Almond, Inc.* v. *United States Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993), in which it invalidated on First Amendment grounds the generic advertising program established by the almond marketing order then in effect under the AMAA. Adhering to the reasoning in *Cal-Almond*, the court analyzed the generic advertising program in this case under the test for restrictions on commercial speech articulated by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 (1980). Pet. App. 16a (citing *Cal-Almond*, 14 F.3d at 436). Under that test, a regulation that suppresses truthful, non-misleading commercial speech is constitutional if (1) the government's asserted interest in the regulation is "substantial;" (2) the regulation "directly advances" that interest; and (3) the restriction on speech "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

The court held that the government's interest in "enhancing returns to peach and nectarine growers" is substantial. Pet. App. 16a. It further observed that "[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product being advertised." *Id.* at 17a. Under its prior decision in *Cal-Almond*, however, the court stated that the proper constitutional inquiry "is not whether the generic advertising program has increased peach and nectarine sales—it undoubtedly has. Rather, the question is whether the mandatory generic advertising program sells the product more effectively than the specific, targeted marketing efforts of individual handlers." *Ibid.* (internal quotation marks omitted). The court held that the government had failed to establish that the programs satisfy that standard.

First, the court noted that the sums that respondents paid toward generic advertising "could have been used in their own marketing efforts" (Pet. App. 18a), and that respondents had identified individual advertising techniques that they believed would be more beneficial to them. *Ibid.*[12] Second, while concluding that "the Secretary has demonstrated that advertising increases consumption of peaches and nectarines," the court held that the government had "not gone the necessary next step of demonstrating that the generic advertising program is better at increasing consumption than individual advertising." *Id.* at 20a.

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[12] The court noted, for example, that "[respondent] Kash, Inc. claims it benefits more from in-store promotions, and that it would devote more resources to such advertising if it did not have to contribute to the generic advertising program. [Respondent] Gerawan Farming, Inc. suggests that it would advertise its own label." Pet. App. 18a.

The court also held that the generic advertising programs were not narrowly tailored to achieve the government's interest. Pet. App. 20a-21a. Specifically, the court faulted the programs for their failure to include a credit system, whereby handlers may obtain a limited reduction in their assessment for certain of their own advertising efforts. In the court's view, the existence of a credit system in the marketing order for California almonds considered in *Cal-Almond*, see 7 C.F.R. 981.441(c) (1993), demonstrated that the program for nectarines and peaches is not narrowly tailored. Pet. App. 20a-21a.

Addressing the question of remedy, the court held that respondents were not entitled to monetary damages but were entitled to a refund of that portion of past assessments that was used for generic advertising. Pet. App. 32a-34a. The court determined that sovereign immunity precluded an award of monetary damages, but that equitable relief in the form of a refund was available. *Id.* at 32a-33a. The court remanded the case to the district court for a determination of the amount of the refund due. *Id.* at 34a.[13]

SUMMARY OF ARGUMENT

I. Neither the Agricultural Marketing Agreement Act nor the generic advertisement programs at issue in this case suppress or restrict respondents' speech. Rather, the programs use monetary assessments to fund collective activities that have an expressive component. In such circumstances, the appropriate First Amendment analysis is one that looks to the relevance or "germaneness" of the subsidized activities to the government's important regulatory objectives. See, *e.g.*, *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller* v. *State Bar of California*, 496 U.S. 1 (1990). That analysis, and not the test for the suppression of commercial speech under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), is applicable here.

[13] The court of appeals also rejected respondents' challenge to the fruit maturity and minimum size provisions of the marketing orders. Pet. App. 22a-31a. This Court denied respondents' cross-petition for a writ of certiorari (No. 95-1393) seeking review of the court of appeals' decision with respect to the maturity standards. 116 S. Ct. 1876 (1996).

The generic advertising programs comport with the First Amendment under the principles of *Abood* and *Keller*. The programs are undeniably "germane" to the statutory purposes of establishing stable agricultural market conditions and expanding the market for the covered commodities by increasing consumption of those commodities. The system of mandatory assessments also serves the government's interest in preventing the problem of "free riders" within the industry who would otherwise benefit from commodity advertising without contributing to its cost. Moreover, because the challenged programs involve purely commercial speech that promotes consumption of products that respondents have voluntarily chosen to sell, any burden on their speech is minimal in comparison to the union and integrated-bar contexts from which *Abood* and *Keller*, respectively, arose.

II. If we assume, *arguendo*, that the *Central Hudson* test is applicable to respondents' First Amendment challenge, the generic advertising programs satisfy that test. The court of appeals erred by requiring the government to demonstrate that generic advertising is more effective than hypothetical private advertising by individual handlers in achieving the government's objectives. In any event, Congress could reasonably conclude that advertising by individual handlers would not fully serve the

government's interest in a broad-based commercial message, and would not adequately address the problem of "free riders" or as effectively protect the interests of producers, who are at the core of the Act's purposes. Moreover, the court of appeals' test is unworkable, because its results are inevitably the product of speculation about collective private conduct, would shift over time, and would vary depending on the party framing each challenge, thereby robbing the government of the stability and predictability that the AMAA seeks to achieve.

The court similarly erred in concluding that the generic advertising programs at issue here are not narrowly tailored because they do not allow handlers credit against their assessments for advertising their own brands. Such a credit system would prevent the government from addressing the problem of free riders, and is unsuited to the commodities markets covered by these marketing orders. The record here shows not only that generic advertising increases overall consumption of the fruits covered by these marketing orders, but also that generic advertising is the most effective means of expanding the total market for these fruits. The court of appeals thus erred in concluding that the generic advertising programs do not satisfy the *Central Hudson* test.

ARGUMENT

THE GENERIC ADVERTISING PROGRAMS UNDER THE AGRICULTURAL MARKETING ORDERS FOR NECTARINES, PEACHES, AND PLUMS ARE FULLY CONSISTENT WITH THE FIRST AMENDMENT

The marketing orders at issue in this case are designed to stabilize the market for California nectarines, peaches and plums; to improve and promote the marketing, distribution and consumption of those fruits; and to enhance the incomes of the farmers who grow them. The costs of

administering the marketing orders are assessed against the handlers of the fruits on a pro rata basis. Respondents are in the business of selling peaches, nectarines and plums. Respondents nevertheless object to efforts by the committees administering the marketing orders to promote such sales through generic advertising, and they claim a First Amendment right not to pay the portion of their pro rata assessment that is used for that purpose.

Respondents' objections are, however, far removed from the central concerns of the First Amendment. The marketing orders impose no restrictions at all on respondents with respect to their own speech, commercial or otherwise, including whatever advertising and promotional efforts they might undertake on their own. Nor do the orders require respondents to contribute to expressive activities of a political or ideological nature. The generic advertising is pure commercial speech: it proposes and promotes commercial transactions—in commodities that respondents have voluntarily chosen to sell. Such advertising is integrally related to the overall purposes of the marketing orders, which provide for a range of concerted measures in the marketing of the commodities. The orders not only further substantial public purposes, but also further the interests of respondents and other handlers and growers in the California summer fruit market. The requirement that respondents contribute their pro rata share of the overall expenses of administering the marketing orders fairly allocates the burdens of participation in a market covered by a marketing order according to the benefits each handler receives, and thereby prevents the problem of the "free rider." Such a program of commercial regulation represents no substantial interference with interests protected by the First Amendment.

I. THE GENERIC ADVERTISEMENT PROGRAMS ARE CONSTITUTIONAL UNDER THE PROPER FIRST AMENDMENT ANALYSIS, WHICH FOCUSES ON THEIR GERMANENESS TO THE GOVERNMENT'S IMPORTANT REGULATORY OBJECTIVES

In accordance with its prior decision in *Cal-Almond, Inc.* v. *United States Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993), the court of appeals analyzed respondents' First Amendment challenge to the generic advertising programs under the test articulated by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Pet. App. 16a. In *Cal-Almond*, the court reviewed a marketing order for California almonds under the *Central Hudson* test because it viewed that order as imposing a "[r]estriction[] on lawful and non-misleading commercial speech." *Cal-Almond*, 14 F.3d at 436. We of course agree that the expression at issue in *Cal-Almond* and this case is commercial in nature. See, *e.g.*, *Board of Trustees* v. *Fox*, 492 U.S. 469, 473-474 (1989) (commercial speech is expression that "propose[s] a commercial transaction"); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (same). The *Central Hudson* test, however, is inapposite in this setting. That test is applicable to regulations that suppress or ban commercial speech. See, *e.g.*, *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996). It does not apply where, as here, a regulatory framework uses monetary assessments to fund collective activities having an expressive component. In such circumstances, this Court has applied an analysis that looks to the relevance or "germaneness" of the subsidized expressive activities to the government's regulatory objectives. See, *e.g.*, *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis* v. *Railway Clerks*, 466 U.S. 435, 447 (1984); *Keller* v. *State Bar of California*, 496 U.S. 1 (1990). In this case, there can be little doubt that generic advertising of a commodity covered by an agricultural marketing order is germane to the purposes for which the order is adopted in the first place: to stabilize the market for the commodity, promote its sale, and enhance the purchasing power of the farmers who produce the commodity.

A. The test employed by the Court in *Central Hudson* and its progeny seeks to vindicate the First Amendment interest in "the informational function of advertising." 447 U.S. at 563 (citing *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978)); see also *Virginia State Bd. of Pharmacy*, 425 U.S. at 770 ("people will perceive their own best interests if only they are well enough informed, and * * * the best means to that end is to open the channels of communication rather than to close them"); *Board of Trustees*, 492 U.S. at 480 ("the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing * * * the harmless from the harmful"); *44 Liquormart*, 116 U.S. at 1506 (plurality opinion). Accordingly, the Court has applied that test to regulatory schemes that ban or otherwise suppress commercial speech. See, *e.g.*, *Central Hudson*, 447 U.S. at 558 ("This case presents the question whether a [state regulation] violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility."); *44 Liquormart*, 116 S. Ct. at 1501 (invalidating state statutes that prohibited retailers from "advertising in any manner whatsoever" the price of alcoholic beverages and imposed "a categorical prohibition against the publication or broadcast of any advertisements" mentioning alcohol prices); *Coors Brewing Co.*, *supra* (invalidating federal statute prohibiting beer labels from displaying alcohol content); *Edenfield* v. *Fane*, 507 U.S.

761, 763-764 (1993) (invalidating state agency's "comprehensive rule" prohibiting personal solicitation by certified public accountants).

By contrast, the generic advertising programs for California peaches, nectarines, and plums at issue here *promote* the dissemination of truthful information, without limiting or suppressing respondents' ability to advance their own commercial messages. The statutory authority for the marketing orders provides that "[n]o order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product." 7 U.S.C. 608c(10). Consistent with that prohibition, neither marketing order attempts to regulate, or in any way to restrict, respondents' private advertising efforts. Respondents thus remain free to advertise their own products, to criticize their competitors' products, and even to criticize the generic advertisements created pursuant to the marketing orders.[14]

The court of appeals suggested that the imposition of an assessment on handlers "hampered" their ability to engage in their own advertising because it deprived them of money that they could otherwise have spent on such endeavors. Pet. App. 18a; see also Resp. C.A. Br. 11. That incidental consequence of the assessment system is constitutionally irrelevant. An assessment, tax or other financial burden imposed by government does not implicate the First Amendment simply because the payor might otherwise have used the funds to engage in expressive activity. While the purposes for which a mandatory assessment is used are relevant to the constitutional analysis, the mere exaction of that payment does not independently raise First Amendment concerns. Thus, respondents' challenge can only properly be founded, not on any restriction of their right to engage in their own commercial speech, but on the requirement that they contribute to the cost of commercial speech conducted on behalf of California summer fruit growers and handlers generally.

[14] Moreover, the challenged financial assessments are not imposed on the basis of, and are not triggered by, any advertising or other expressive activity undertaken by respondents. Compare *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of California*, 475 U.S. 1 (1986); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-257 (1974).

B. The marketing orders in this case are part of a larger regulatory framework aimed at enhancing the Nation's agricultural economy through the collective efforts of government and members of the affected industries. See 7 U.S.C. 601, 602. Here, such collaborative programs involve mandatory contributions that are used, *inter alia*, for expression made on behalf of a group that includes the contributors. In such a case, this Court employs a First Amendment test that accommodates the government's programmatic interests while protecting individuals from compelled expression falling outside of those interests.

In a series of cases beginning with *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225 (1956), and *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961), the Court considered the authority of government to require membership in, or contributions to, labor unions as a condition of employment. See also *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292 (1986); *Ellis* v. *Railway Clerks*, *supra*; *Abood* v. *Detroit Bd. of Educ.*, *supra*. The Court acknowledged in those cases that employees "may very well have ideological objections" to some of the union's activities, and that, as a result, "compel[ling] employees financially to support their

collective-bargaining representative has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222. But those cases hold that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress," *ibid*., through the promotion of "labor peace," *id*. at 224, and "labor stability," *id*. at 229. The Court has further recognized that the problem of "free riders"—employees who would decline to contribute to the union while obtaining the benefits of union representation—justifies a system of compelled assessments to support the union's activities. See *Street*, 367 U.S. at 760; *Ellis*, 466 U.S. at 447. These "important government interests," *Abood*, 431 U.S. at 225, justify a system of mandatory union contributions in both public and private employment. *Ellis*, 466 U.S. at 435.

Under the analysis developed in the union cases, "expenses that are relevant or 'germane' to the collective-bargaining functions of the union generally will be constitutionally chargeable to dissenting employees." *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. at 516. "[A] union, however, [may] not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis*, 466 U.S. at 447; see also *Abood*, 431 U.S. at 232 ("agency shop" agreement for public employees does not violate the First Amendment "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes," but service charges could not be used "for political and ideological purposes *unrelated to collective bargaining*") (emphasis added). Otherwise stated, unions may utilize the dues of dissenting employees for expressive activities, so long as those activities are

germane to the unions' statutory role under the labor laws.[15]

In *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), the Court applied a similar analysis in a First Amendment challenge to an "integrated-bar" arrangement whereby a State conditions the practice of law on membership in, and payment of dues to, an association of attorneys vested by statute with various functions with respect to the practice of law. The Court discerned "a substantial analogy between the relationship of [an integrated] State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Id*. at 12. It observed, *inter alia*, that the "free rider" problem that supports mandatory assessments in the union context also arises with respect to associations of lawyers authorized to regulate their own profession. *Ibid*. ("It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort."). The Court therefore held in *Keller* that the State Bar's member-subsidized activities are "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id*. at 13. In applying that rule to the integrated-bar context, the Court held that the State Bar could utilize the dues of dissenting members

[15] When a union engages in activities outside of its specific statutory functions, courts inquire in addition whether the expenses at issue "involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." *Ellis*, 466 U.S. at 456; see also *Lehnert*, 500 U.S. at 518.

for expressive activities so long as "the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (quoting *Lathrop* v. *Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion)).

In this case, in turn, there is a "substantial analogy," *Keller*, 496 U.S. at 12, between the relationship of the fruit committees and the growers and handlers governed by the marketing orders, on the one hand, and the relationship of the union and the integrated bar and their members, considered in *Abood*, *Keller*, and related cases, on the other. Cf. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 345 (1977) (noting, in context of "associational standing" under Article III, parallels between state-created commodity advertising commission, labor unions, and integrated bar associations). In all three contexts, a statutorily recognized body utilizes mandatory assessments to engage in a range of representative activities, including expressive conduct, on behalf of its constituents. In each context, moreover, the regulatory framework imposes no restriction on the contributors' own speech; the First Amendment is implicated solely by the use of mandatory assessments for activities having a speech component. Compare *Abood*, 431 U.S. at 230 (public employees subject to agency-shop arrangement remain free to express their personal viewpoints). The "germaneness" analysis thus provides the appropriate test under which to evaluate respondents' First Amendment claims.

C. The generic advertising programs for peaches, nectarines, and plums clearly pass muster under the "germaneness" test. Certain aspects of the expressive

activities at issue here, moreover, further diminish any impact on respondents' free-speech interests.[16]

1. The broad objectives served by the AMAA's regulatory framework, and by the generic advertising programs in particular, are comparable to those identified by this Court in the labor and integrated-bar contexts. The court of appeals therefore correctly held that the governmental interest underlying the generic advertising programs is a "substantial" one. Pet. App. 16a-17a.

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[16] The committees responsible for administering the marketing orders at issue here are established and appointed by the government, and their budgets and the assessments necessary to support them are approved by the government. In addition, although the assessments are levied against the handlers of the fruits, the marketing orders are designed in large measure for the benefit of the producers (farmers). See pages 26, 28, *infra*. Thus, unlike in the union and integrated-bar contexts, the constituency of the governing body extends beyond those who contribute financially to its support. Although producers must approve the adoption of a marketing order, that condition does not detract from the status of the marketing order as a governmental regulation. See *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939).

In the court of appeals, the United States did not advance the argument that the generic advertising supported by the system of assessments on handlers constitutes "government speech" that does not implicate respondents' First Amendment rights. See, *e.g.*, *Keller*, 496 U.S. at 10, 12-13; *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment) ("[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is the representative of the people."). We similarly do not rely on that argument in this Court as an independent ground of decision. We note, however, that the constitutionality of these programs is reinforced by the substantial degree of governmental involvement in the development and adoption of the promotional efforts, by the attenuated connection between handlers' contributions to the administration of the orders and the generic advertising that results, and by the broader statutory goal of furthering the interests of producers (not merely handlers) through generic advertising and other aspects of the marketing orders.

The AMAA's express goal of "maintain[ing] * * * orderly marketing conditions for agricultural commodities," 7 U.S.C. 602(1), and the advertising programs' aim of "promot[ing] the marketing, distribution, and consumption" of covered commodities, 7 U.S.C. 608c(6)(I), play an important role in the Nation's economy. Compare *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. at 336-337, 344-345. As the district court held in this case (Pet. App. 89a), the Act's promotional programs were intended to address the devastating effects of depressed consumption and unstable market forces that prevailed at the time of their enactment. See *ibid.* (describing economic effects of market instability at the time the AMAA's promotional assessment program was adopted); *ibid.* (provisions of the Act authorizing promotional activities "present[] a farm program to protect the income of farmers while comprehending the interest, the needs, and the security of all segments of the economy and all our people") (quoting H.R. Rep. No. 1927, 83d Cong., 2d Sess. 5 (1954)). That history amply demonstrates the importance of the programs' objectives. Further, as the court of appeals concluded in rejecting respondents' APA challenge (Pet. App 9a-11a), the operation of the Act's industry-based Committees, and the process by which commodity-specific marketing orders are developed, reinforce the continuing importance of the programs to the covered markets. It is only fair that the participants in that market pay their pro rata share of the costs of those programs.

In addition, the system of mandatory assessments to support the marketing orders addresses a "free-rider" problem similar to that at issue in the union and integrated-bar cases. See, *e.g.*, *Chicago Teachers Union*, 475 U.S. at 302-303; *Keller*, 496 U.S. at 12. That problem arises in connection with advertising just as it does in

other aspects of the marketing orders. Generic advertising programs utilize economies of scale to reach the largest number of potential customers of a given commodity. They also provide a mechanism for smaller handlers and individual farmers to obtain the benefits of advertising that they could not afford on their own. Those benefits of collective action would be virtually impossible to achieve in the absence of mandatory assessments. As the Acting Secretary of Agriculture noted in recommending legislation authorizing paid advertising under AMAA marketing orders, "[v]oluntary efforts have shown that financing an advertising program is difficult without the help of State legislation or similar mediums such as under a Federal marketing order." H.R. Rep. No. 846, 89th Cong., 1st Sess. 3 (1965). See also Olan D. Forker & Ronald W. Ward, *Commodity Advertising: The Economics and Management of Generic Programs* 10 (1993) (programs for generic advertising and promotion of agricultural commodities "are a direct outgrowth of the potential free-rider problem"); Nicholas J. Powers, U.S. Dep't of Agriculture, *Agricultural Economic Report No. 629*, *Federal Marketing Orders for Fruits, Vegetables, Nuts and Specialty Crops* 19 (1990) ("[c]ollective funding of generic advertising and promotion overcomes * * * problems of free riders and helps assure that handlers share the costs in proportion to any benefits").

The danger that would be posed by a program that did not provide for mandatory assessments is not simply that certain individuals would unfairly benefit from the collective efforts of others, but also that the collective system of benefits—here, promotional programs intended to enhance and stabilize the industry as a whole—would collapse for lack of participation. See, *e.g.*, James D. Gwartney & Richard L. Stroup, *Economics: Private and*

Public Choice 679 (1987) (Where a large number of free riders exist, "the aggregate lack of action will lead to an insufficient quantity of public goods."); *United States* v. *Ruzicka*, 329 U.S. at 293 ("Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements."); cf. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977) (observing, in the antitrust context, that market imperfections such as the free-rider problem may result in the unavailability of certain retailer services "despite the fact that each retailer's benefit would be greater if all provided the services than if none did"). Addressing the free-rider problem thus is inextricably linked to the Act's broader goals.

2. The advertising and promotional programs authorized by the marketing orders are, by their nature, germane to the Act's important regulatory goals. In contrast to cases involving labor unions and bar associations—organizations that may have occasion to engage in a range of expressive conduct unrelated to their statutory duties—this case involves the specific authorization in the AMAA itself for marketing orders to provide for activities that are "designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production" of covered commodities. 7 U.S.C. 608c(6)(I); see also 7 C.F.R. 916.45, 917.39. In addition, the Secretary must terminate or suspend a marketing order if he finds that it "obstructs or does not tend to

effectuate the declared policy" of the Act. 7 U.S.C. 608c(16)(A)(i).[17]

Pursuant to that mandate, the Secretary adopted the challenged marketing orders based, *inter alia*, on "the consensus of the industry * * * that promotional activities * * * have been beneficial in increasing demand," 36 Fed. Reg. 8735, 8736 (1971); Pet. App. 74a, and that certain advertising techniques "create an impact on the buying trade as well as the consuming public." 36 Fed. Reg. at 8737; Pet. App. 74a. See also 41 Fed. Reg. 14,375, 14,376-14,377 (1976); 31 Fed. Reg. 5636 (1966). Moreover, as the court of appeals found (Pet. App. 11a), "[t]he Nectarine Administrative Committee and the Peach Commodity Committee engage in a careful process each year prior to and during their annual spring meetings in approving the advertising program for the upcoming season." In particular, the staff of the Subcommittee on Advertising and Promotion formulates its advertising recommendations based on "monthly reports on price trends, consumer interests, and general market conditions." *Ibid.* The individual advertisements produced pursuant to this process are necessarily in furtherance of the Committees' statutory mission—a mission that, as explained above, could not be met absent compelled assessments.

The court of appeals erred in focusing its inquiry on the efficacy of the generic advertisements as compared with the potential advertising or promotional efforts of individual handlers. See Pet. App. 17a. Where, as here,

[17] The Secretary must also terminate an order if he determines that a majority of producers does not support it. 7 U.S.C. 608c(16)(B). Because the consensus of producers is generally an accurate measure of the utility of a particular marketing order, this provision offers an additional guarantee of the germaneness of an order's provisions.

subsidized speech is germane to important governmental objectives, it need not also be shown to be more effective in achieving those objectives than would private speech by the individuals against whom assessments are levied. In the union context, for example, particular strikes, picketing, and other bargaining tactics by unions are often ineffective at achieving their desired goals. That fact, however, does not render them unconstitutional when carried out with compelled employee funds. Dissenting employees "may feel that their money is not being well-spent, but that does not mean that they have a First Amendment complaint." *Ellis*, 466 U.S. at 456. Nor does the fact that an individual employee might have independently obtained the desired benefit for herself through independent means render invalid the union's subsidized activities on behalf of the group. To the contrary, "[t]he very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds." *Ibid.* As this Court has explained:

> The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.

Abood, 431 U.S. at 222-223 (quoting *Street*, 367 U.S. at 778 (Douglas, J., concurring)). Because the Committees' generic advertising activities are germane to important governmental objectives, they are constitutional, even if they do not uniformly succeed in achieving those objectives, and even if they have not been proven more effective than respondents' hypothetical efforts.[18]

The court of appeals also erred in rejecting the "free-rider" rationale on the ground that the generic advertising programs at issue here do not completely prevent their benefits from flowing to non-contributors. Pet. App. 21a. The court observed that because the challenged marketing orders cover only California handlers of peaches and nectarines, handlers of those products in other States (who are not required to contribute to generic advertising efforts) may benefit from the California programs. *Ibid*. The court's reasoning misconstrues the nature of the free-rider problem, and ignores the statutory framework within which the programs operate.

California dominates the national markets for the fruits covered by these marketing orders,[19] and, therefore, its handlers and producers stand to reap most of the benefits of increased sales resulting from generic advertising of the commodities. Moreover, the utility of generic advertising under these marketing orders to out-of-state producers and handlers is limited because, as the court of appeals recognized, the advertising promotes California fruit as unique. Pet. App. 8a; J.A. 396 (DX 303). This focus on the commodities' State of origin reflects the approach of the AMAA itself, which requires marketing orders to cover "the smallest regional production areas * * * practicable." 7 U.S.C. 608c(11)(B).

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[18] Moreover, as explained in Part II.B.1, *infra*, the record below amply demonstrates, and the court of appeals correctly found (Pet. App. 20a), that generic advertising achieves the goal of increased consumption of the covered commodities.

[19] California produces approximately 90% of all domestically produced nectarines and plums and 50% of peaches. Wileman II, DX 326.

Particularly in light of the AMAA's region-specific focus, the court of appeals was incorrect in concluding that generic advertising programs do not meaningfully address a free-rider problem.

In the context of union activity, individuals outside of a given bargaining unit may incidentally benefit from union activity that is properly chargeable to members of that unit. This Court has nonetheless held that the avoidance of free riders within a given collective bargaining unit justifies a system of mandatory assessments from that unit. Cf. *Lehnert*, 500 U.S. at 522-524; see also *Keller*, 496 U.S. at 12 (discussing free-rider problem in integrated-bar context).

In any event, the fact that a regulatory program is not universally effective in assessing the costs against everyone who might benefit in some measure does not mean that the program has failed to achieve its important governmental objectives, or to benefit those against whom the costs *are* assessed. Nor, more importantly, does that fact lead to the conclusion that the regulatory program is not germane to its governmental objectives.

3. Under *Hanson*, *Street*, and their progeny, individuals may be compelled to contribute to a representative entity's core statutory activities, even if those activities contain an ideological component. See, *e.g.*, *Ellis*, 466 U.S. at 456; *Lehnert*, 500 U.S. at 517. Thus, while a union may not, for example, use dissenting members' dues to support a political candidate who favors paternity leave or civil rights legislation, it may use those dues to negotiate a contract that contains paternity leave or anti-discrimination provisions, even if such provisions may be objectionable to the dissenting members. See *Abood*, 431 U.S. at 222-223; see also *Keller*, 496 U.S. at 16 (dissenting members of an integrated bar association "ha[d] no valid constitutional objection to their compulsory dues being

spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession").[20]

It follows that where, as here, the compelled contribution is for expression that is not principally ideological in nature, the First Amendment implications are far less severe.[21] In this case, the challenged marketing orders authorize only commercial speech designed to promote greater consumption of the products that respondents themselves offer for sale. See Pet. App. 90a; *United States* v. *Frame*, 885 F.2d 1119, 1136 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). Because of commercial speech's "subordinate position in the scale of First

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[20] As the Court observed in *Abood*, unions' collective-bargaining activities contain an inherently ideological component:

> An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, * * * while another might have economic or political objections to unionism itself. * * * But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

431 U.S. at 222-223.

[21] The Court's cases in this area have repeatedly identified the core First Amendment concern to be the prospect that individuals might be compelled to contribute to the expression of "political" or "ideological" views, not germane to the organization's statutory role, with which they disagree. See, *e.g.*, *Lehnert*, 500 U.S. at 516, 517, 518, 528; *Keller*, 496 U.S. at 13-14, 15; *Chicago Teachers Union*, 475 U.S. at 302, 305; *Ellis*, 466 U.S. at 438, 447, 450; *Abood*, 431 U.S. at 219-220, 232, 234, 235; *Street*, 367 U.S. at 749, 750, 764, 767-772, 775.

Amendment values," the government has broader latitude in this setting. *Board of Trustees* v. *Fox*, 492 U.S. at 477 (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (commercial speech is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression"); see also *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. 2371, 2375 (1995). Further, as the district court observed (Pet. App. 91a), respondents' objections amount to little more than disagreements as to the best strategy for promoting the consumption of the goods they have voluntarily chosen to market. Accordingly, the challenged programs intrude only minimally on respondents' First Amendment interests, and are manifestly justified by their close relationship to the Act's important objectives.

II. THE GENERIC ADVERTISING PROGRAMS ALSO SATISFY THE FIRST AMENDMENT TEST SET OUT IN *CENTRAL HUDSON*

We have explained in Point I, *supra*, that the *Central Hudson* test is inapposite here because this case does not involve any restriction on respondents' commercial speech. Nonetheless, as we demonstrate below, nothing in *Central Hudson* undermines the constitutionality of the generic advertising programs that respondents challenge. Under *Central Hudson*, a restriction on truthful, commercial speech regarding a lawful activity does not violate the First Amendment if the government has asserted a "substantial interest to be achieved by" the restriction, the restriction "directly advance[s]" that interest, and the restriction "is not more extensive than is necessary to serve that interest." 447 U.S. at 566. Assuming, *arguendo*, that the *Central Hudson* test is applicable here, the generic advertising programs satisfy that test.

A. As we have demonstrated, see Part I.C.1., *supra*, the government has a substantial interest both in the narrow goal of "enhancing returns to peach and nectarine growers" (Pet. App. 16a-17a), and in the AMAA's broader objectives of "maintain[ing] * * * orderly marketing conditions for agricultural commodities," 7 U.S.C. 602(1), "promot[ing] the marketing, distribution, and consumption" of covered commodities, 7 U.S.C. 608c(6)(I), and avoiding the problem of free riders. The court of appeals therefore correctly held that the programs satisfy the first element of the *Central Hudson* test. See Pet. App. 16a-17a; see also *Cal-Almond*, 14 F.3d at 437 ("stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest"); *Frame*, 885 F.2d at 1134 (government has a "compelling" interest in "maintaining and expanding beef markets" in order to "prevent[] further decay of an already deteriorating beef industry").

B. The court of appeals further concluded that "the Secretary has demonstrated that advertising increases consumption of peaches and nectarines." Pet. App. 20a. Indeed, this Court has long viewed as axiomatic the proposition that promotional advertising leads to increased consumption of the advertised product or service. See, *e.g.*, *Central Hudson*, 447 U.S. at 569 (recognizing "an immediate connection between advertising and demand for electricity"); *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993) (accepting Congress's "commonsense judgment" regarding the causal link between broadcast lottery advertising and lottery participation); *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986) ("We think [that] the legislature's belief [that advertising of casino gambling would serve to increase

the demand for the product advertised] is a reasonable one.").

The record in this case, moreover, amply supports the court of appeals' conclusion that the generic advertising programs in fact promote consumption of the covered commodities. The record includes, for example, a 1987 study of the effectiveness of that year's generic advertising program for "California Summer Fruits."[22] J.A. 409-427 (PX 297t). The study demonstrated that 65% of consumer-respondents were aware of some aspect of the Committees' advertising campaign, J.A. 417, and that consumer-respondents who were aware of the advertisements were more likely to have purchased all four fruits covered by the program than were those who were not aware of the ads. J.A. 419. The study further reported that the advertising "substantially increased the frequency of purchasing nectarines and pears" and "[t]o a lesser extent * * * increased the frequency of purchasing peaches and plums." J.A. 413. See also J.A. 407 (PX 297v) (consumers who were aware of California Summer Fruits ad campaign were willing to pay higher non-sale prices than were consumers unaware of the ads). See also page 29, *supra*.

The court of appeals nevertheless held that the challenged programs do not "directly advance" the government's interests because the Secretary had not "gone the necessary next step of demonstrating that the generic advertising program is *better* at increasing consumption

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[22] "California Summer Fruits" is the term usually used to refer to the fruits historically covered by the marketing orders at issue here—peaches, plums, pears, and nectarines. Joint advertising for some or all of those products has often been undertaken by the Committees and staff that administer the marketing orders (known as the "California Tree Fruit Agreement"). See Pet. App. 96a-98a; J.A. 396-400 (DX 303), 428-433 (DX 302).

than individualized advertising." Pet. App. 20a (emphasis added). In imposing that further requirement, the court of appeals misapplied the second element of the *Central Hudson* test.

1. In holding that generic advertising under the marketing orders must be shown to be more effective than whatever private advertising individual handlers might undertake, the court of appeals relied on this Court's admonition in *Central Hudson* that a challenged regulation may not be sustained if it "provides only ineffective or remote support for the government's purpose." Pet. App. 17a (quoting *Central Hudson*, 447 U.S. at 564); see also *Cal-Almond*, 14 F.3d at 437. That aspect of the *Central Hudson* test, however, requires only that the challenged regulation effectuate the government's purposes through direct, rather than attenuated or purely speculative, means. See *Central Hudson*, 447 U.S. at 564 ("the Court has declined to uphold regulations that only indirectly advance the state interest involved"); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 769 (1976) (ban on advertising of prescription drug prices did not directly advance the State's interest in the professional standards of its pharmacists because "[t]he advertising ban does not directly affect professional standards one way or another"); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 378 (1977) ("Restraints on advertising * * * are an ineffective way of deterring shoddy work."); see also *44 Liquormart*, 116 S. Ct. at 1509. This Court has never held that the government's methods, in order to be constitutional, must be *more* effective than private efforts of a similar nature might be.

Such a requirement would be especially out of place in the present setting. Because the objectives that support the AMAA's regulatory structure are collective in na-

ture, and relate to the economic well-being both of the industry and of the Nation as a whole, comparisons between the generic advertising efforts of the Committees and the private efforts of respondents have no bearing on whether the former activities "directly advance[]" the government's purposes. Accordingly, the programs' day-to-day impact on respondents and other individual handlers or producers is not a necessary element in the constitutional analysis. See *United States* v. *Edge Broadcasting*, 509 U.S. 418, 427 (1993) ("It is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity."). Not only is the United States' interest linked to national market stability, but, as the district court found, Congress's concerns in adopting the AMAA's promotional provisions focused on "the condition of the American *farmer*." Pet. App. 89a (emphasis added) (citing H.R. Rep. No. 1927, 83d Cong., 2d Sess. (1954)); see also *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 352 (1984) (describing "the protection of the *producers*" as the AMAA's "most fundamental objective[]") (emphasis added). The court of appeals' scrutiny of the programs' comparative impact on respondents and other *handlers* thus ignores an important aspect of the government's interest.

Moreover, the aim of generic advertising is to increase the overall market for the fruit or vegetable grown by producers, thereby avoiding the adverse market conditions associated with reduced demand. Individualized advertising, on the other hand, is intended to increase the demand for the advertiser's own brand, which can result either from encouraging existing consumers of the commodity to choose the advertiser's particular brand, or from increasing overall consumption for the commodity. This dual focus detracts from the effectiveness of brand

advertising in advancing the governmental interest in increasing demand across the entire industry. While such advertising, viewed in the aggregate, no doubt increases the overall market for a commodity, it also aims to give each particular advertiser a larger share of that market. See Forker & Ward, *supra*, at 10 (generic promotion programs are "most often directed to the total commodity and not specific brands; that is, the programs must be designed to benefit the entire industry and not selected segments within the industry."); Powers, *Federal Marketing Orders for Fruits, Vegetables, Nuts and Specialty Crops*, *supra*, at 18. Respondents' claims that they would personally reap a greater benefit from different types of advertisements (see Pet. App. 18a) thus do not diminish the close connection between the Committees' activities and the government's objectives.

2. The record in this case, in addition to showing that the Committees' advertising efforts have increased total consumption of the commodities (see pages 35-36, *supra*), demonstrates the utility of generic advertising in ways that set it apart from advertising by individual handlers. A 1989 study designed "to uncover * * * the primary purchase influences" on consumers of the covered fruits (J.A. 512 (PX 297f)) found that joint marketing of California summer fruits has a synergistic effect on consumption: "[T]hese fruits 'play well' together. People typically buy tree fruits more than one type at a time * * *. Interest begets interest in this category, and purchase begets purchase. There is a definite advantage, therefore, to the presentation of these fruits as a group, especially in the absence of any single fruit having a sufficient advertising and promotional budget to create a unique presence all for itself." J.A. 523-524. That is precisely the type of generic advertising in which individual handlers of a particular fruit will not engage, but

which reaps demonstrated benefits for the industry as a whole.

Similarly, record evidence demonstrates the importance of consumer education regarding the maturity and proper ripening of the covered fruits. A study in the record found that "pervasive ignorance regarding how tree fruits should be ripened" exists among consumers, and that many potential customers will unnecessarily refrain from buying fruit that is not ready to eat immediately. J.A. 520-521 (PX 297f). The study emphasized the importance of "point-of-sale" advertising and promotional efforts designed not only to encourage purchases, but also to educate the customer about the fruit in order to avoid negative experiences that discourage future sales. J.A. 526. Individual handlers typically lack the incentive and resources to engage in that type of expansive undertaking, in addition to promoting their own brands. Collectively-funded generic advertising is therefore a necessary and effective tool for enhancing nationwide consumer interest and demand.

Another study in the record demonstrates that over 90% of each fruit's total volume of sales is drawn from repeat purchasers, and that the highest percentage of repeat purchasers was found among customers who first purchased the fruit during its first four weeks of availability during the season. J.A. 405 (PX 297v). The study concluded that, "[g]iven the importance of these buyers, it is essential to focus directly on them and their initial entry into the market." J.A. 405. Advertising expenditures focused on these "early triers" thus has the best chance of increasing total commodity sales. See J.A. 404-405. But because the numerous varieties of each of the fruits in question here appear on the market at various times in the summer season, and because each remains available for only a few weeks, see, *e.g.*, Wileman

I, Pt. 37, DX 15 (table from 1986 annual report of California Tree Fruit Agreement indicating initial shipment dates ranging from mid-April to mid-October for 71 different varieties of peaches during the years 1977 through 1986); Wileman II, DX 256 and 298 (charts indicating weeks of availability in 1989 season for selected varieties of all three fruits), the incentive for individual handlers is to advertise when their particular variety comes on the market, not at the beginning of the season for peaches, plums, or nectarines generally. Generic advertising by the Committees addresses that need. See, *e.g.*, J.A. 467 (PX 297x) (discussing Committees' "First Day of Summer" promotional campaign).

Finally, the record demonstrates that the generic advertising programs result in a breadth of consumer exposure to advertising messages that is beyond the realistic reach of individual advertisers. In a policy statement regarding their joint plans for the 1988 season, for example, the Committees reported that their projected array of radio and television advertisements for California summer fruits would reach "virtually every U.S. market with almost 212 billion impressions against U.S. adults." J.A. 479 (DX 31pp). The economies of scale made possible by those collectively-funded efforts are simply not available to the individual advertiser. See Powers, *supra*, at 19 ("[t]he minimum investment required for advertising and promotion to be effective in developing and expanding regional, national, and overseas markets is generally too large for most individual handlers"). J.A. 413 (PX 297t) (In order for advertising to have substantial impact on consumer attitudes and behavior, "[a] large percentage of the target audience must be exposed to the advertising."). Thus, there is ample support in both common sense and the record in this case for the conclusion that generic advertising

furthers the goals of the AMAA in ways that individual advertising could not be expected to do.

3. What is more, the court of appeals' requirement that the Secretary affirmatively demonstrate—at any given time, under each marketing order—that generic advertising is more effective than individual advertising would impose an unworkable standard that may be virtually impossible to satisfy in any given case. First, there is no way definitively to determine what form and level of advertising individual handlers would engage in absent a system of mandatory assessments. Assertions and evidence as to *respondents'* future conduct do not, of course, speak to the activities of the industry as a whole—or even to all handlers who might seek to opt out of the generic advertising program. Nor is there any way reliably to gauge such future conduct.

Second, a particular level of private advertising today does not ensure a constant minimum of advertising in the future, as do the programs sponsored by these marketing orders.[23] The court of appeals' standard would rob the industry and the public of the stability and predictability that are the cornerstone of the AMAA's regulatory structure and purpose.

Third, the results of the court of appeals' inquiry would necessarily shift over time as new advertising techniques were adopted and old ones abandoned, both by individual handlers and by the committees administering the marketing orders. Under the court's analysis, a handler apparently may mount a new constitutional challenge whenever it identifies a different promotional

[23] The Secretary's prior approval of a budget for generic advertising has the added advantage of enabling members of the covered industry to plan their own advertising efforts for the season with the knowledge that a minimum level of generic promotional activities will occur.

strategy that it believes would better increase consumption. See Pet. App. 18a. Disagreements as to strategy would threaten the government's ability to institute long-term measures. See *id.* at 90a-91a. Similarly, the court of appeals' standard would prevent committees from adopting innovative advertising techniques. Because new promotional approaches would be, by definition, untested, the government could not meet its burden of demonstrating that its approach would prove more effective than the efforts of individual handlers. The constitutional validity of the challenged programs cannot depend on such a speculative inquiry.

4. Contrary to the court of appeals' conclusion (Pet. App. 21a), the funding of generic advertising through mandatory assessments also directly advances the government's interest in addressing the problem of free riders—members of the industry who would not engage in advertising aimed at increasing overall consumption absent a program of mandatory assessments. The fact that respondents would purportedly engage in additional advertising absent a system of mandatory assessments does not mean that other handlers who benefit from the generic advertising programs would not become free riders if mandatory assessments were terminated. The free-rider problem, like the other problems addressed by marketing orders, is an industry-wide concern that warrants a uniform and comprehensive response.

Even if we assume, *arguendo*, that all handlers would today engage in individual advertising that resulted in aggregate consumption equal to or greater than generic efforts could generate—an assumption that the record in this case does not support—there would be no assurance that individual handlers would continue to advertise at a constant rate, or with consistent success. Absent an ongoing program supported by mandatory (and there-

fore predictable) assessments, the Committees would be unable to respond quickly to a reduction in private advertising, or to a change in consumer behavior. That danger is particularly acute in this case, because the commodities covered by the marketing orders that respondents challenge have a long and costly development period, and an exceedingly short period of availability. See, *e.g.*, Wileman II, DX 256 and DX 298. In short, if the generic advertising programs were eliminated, the government's ability to prevent fluctuations in supply and demand, and the economic disruptions that such uncertainty causes, would be significantly diminished.

C. Under the *Central Hudson* analysis, in order to demonstrate that the generic advertising programs are "not more extensive than is necessary" to serve the government's important interests, 447 U.S. at 566, the Secretary need not demonstrate that "the manner of restriction is absolutely the least severe that will achieve the desired end." *Board of Trustees* v. *Fox*, 492 U.S. at 480. "What [this Court's] decisions require, instead, is a 'fit' between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable." *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. at 2380 (internal quotation marks omitted); see also *44 Liquormart*, 116 S. Ct. at 1510. "Within those bounds," the First Amendment "leave[s] it to governmental decisionmakers to judge what manner of regulation may best be employed." *Board of Trustees* v. *Fox*, 492 U.S. at 480; see also *44 Liquormart*, 116 S. Ct. at 1511 ("Our commercial speech cases recognize some room for the exercise of legislative judgment."). The generic advertising programs satisfy that standard.

1. Rather than banning or suppressing expression by handlers, the programs utilize the less intrusive strategy of imposing standardized charges to support commercial

speech on behalf of the California summer fruit industries as a whole. See, *e.g.*, J.A. 530 (DX 301(b)). Compare *Central Hudson*, 447 U.S. at 558; *44 Liquormart*, 116 S. Ct. at 1501; *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *Edenfield* v. *Fane*, 507 U.S. at 763-764. In addition, because the government seeks in this case to encourage, rather than prohibit, increased public consumption of a product, it does not have available the option of direct, non-speech-based regulation of consumer conduct. Compare, *e.g.*, *Coors Brewing Co.*, 115 S. Ct. at 1593 (given government's ability to, among other things, directly limit the alcohol content of beer, provision banning disclosure of alcohol content on beer labels was invalid); *44 Liquormart*, 116 S. Ct. at 1510 (plurality opinion) (State could not promote consumer "temperance" through ban on advertising of liquor prices given the available option of directly limiting consumer purchases). Because Congress cannot plausibly require the public to increase its consumption of a given commodity in the way that it could prohibit or otherwise limit such consumption, the use of advertising and other promotional efforts represents a narrowly tailored method of achieving the public purpose of increasing consumption.

2. The court of appeals held that the generic advertising programs are not narrowly tailored to achieve the government's objectives because they do not include an advertising "credit" system of the kind contained in the Almond Marketing Order at issue in *Cal-Almond*, *supra*. Pet. App. 20a. Under that system, an almond handler could seek a reduction in the portion of its assessment attributable to generic advertising based on certain of its

own advertising efforts. See *Cal-Almond*, 14 F.3d at 433-434; 7 C.F.R. 981.441(c) (1993).[24]

Contrary to the court of appeals' reasoning, if we assume that the *Central Hudson* analysis applies here at all, the absence from these marketing orders of a credit system for private advertisement efforts does not undermine the conclusion that there is a reasonable fit between the generic advertising programs and the government's objectives. The use of a credit system in the programs for these commodities would be contrary to the government's interest in avoiding free riders. Under such a system, individual handlers would have little interest in participating in collective efforts to promote increased overall consumption of a commodity. Instead, there would be a strong incentive for each individual handler to tailor its own advertising to inure to its own benefit. Moreover, because the free-rider problem that would arise from the inclusion of a credit system would threaten the Secretary's capability to fund generic advertising at all (see pages 27-28, *supra*), it would jeopardize the government's ability to achieve *any* of its stated interests.

The court of appeals discounted the Secretary's concerns regarding the free-rider problem as "weak in the case of peach and nectarine programs" because the almond marketing program at issue in *Cal-Almond* contained a credit system "and yet managed to avoid the problem of free riders," and because the generic pro-

[24] The court in *Cal-Almond* struck down the generic advertising program for almonds, notwithstanding the credit provision, because it concluded that the program impermissibly denied handlers credit for particular categories of advertising expenses. 14 F.3d at 440. The Secretary subsequently altered the Almond Marketing Order in response to the *Cal-Almond* ruling. See 7 C.F.R. 981.441(c) (1995).

gram here does not prevent free riding by out-of-state handlers who are not bound by these marketing orders. Pet. App. 21a. In light of the regional, commodity-specific nature of the AMAA's regulatory program, these factors do not alter the conclusion that the generic advertising programs at issue here are narrowly tailored.

The AMAA requires marketing orders to be restricted "to the smallest regional production areas * * * practicable," 7 U.S.C. 608c(11)(B), and, as noted, the process by which the Secretary and the committees fashion particular advertising and promotional programs focuses on commodity-specific market conditions. Where, as in the California almond industry, a single agricultural cooperative or producer dominates the market for retail sales of a commodity,[25] certain types of individual and brand advertising may accomplish the government's goals of market stability and increased consumption without creating a significant free-rider problem. Because authorized private advertising benefits both the dominant seller and the industry generally, and accomplishes the coordination necessary for effective market-wide advertising, potential non-participation by smaller entities in such a market poses less of a threat to the viability of the marketing order, and results in less unfairness.

The conditions that permit the use of a credit system for California almonds and certain other commodities do not exist in the California peach, plum, and nectarine industries because no single entity dominates the overall retail market. As a result, the risk of free riders in those industries, and the resulting potential for a credit system to undermine the generic advertising programs, are particularly pronounced. Such distinctions between the two

[25] See *Cal-Almond*, 14 F.3d at 438 n.9 ("As of July 1987, Blue Diamond had a 92 percent share of almonds sold in grocery stores.").

markets are more than sufficient to explain the difference in approach.

For similar reasons, the fact that handlers and producers in other regions are not included in the generic promotion and advertising programs does not defeat their constitutionality. Though generic, the advertisements authorized by the marketing orders generally promote fruits from the covered region. See, *e.g.*, J.A. 396-400 (DX 303), 428-433 (DX 302), 530 (DX 301(b)). In addition, the central threat posed by the free-rider problem is that it will erode or eliminate financial support for the AMAA's region-specific activities. The fact that the Committees' programs may have the ancillary effect of benefitting handlers and producers in other regions does not diminish the suitability of mandatory assessments on handlers within the region covered by the marketing orders. Those handlers, and the producers whose fruits they purchase, realize the most immediate benefits from the marketing orders, including their generic advertising provisions. It therefore is only fair that those handlers pay their pro rata share of the expenses of administering the orders. The First Amendment does not prevent Congress—and the regional industry itself—from providing for such a program of commercial regulation and promotion that is grounded in and responsive to regional concerns.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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